



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

October 11, 1995

The Honorable Albert G. Valadez  
District Attorney  
83rd Judicial District of Texas  
104 West Callaghan  
Fort Stockton, Texas 79735

Letter Opinion No. 95-061

Re: Whether a presiding administrative district judge may appoint a visiting judge prior to preclearance by the United States Department of Justice (ID# 35935)

Dear Mr. Valadez:

You have requested our opinion regarding the present status of district court cases pending in Brewster, Presidio, and Jeff Davis counties. Specifically, you ask whether the presiding administrative district judge may "appoint a visiting district judge to the 394th District prior to preclearance by the U.S. Department of Justice."

The recent regular session of the legislature enacted House Bill 3235, Act of May 29, 1995, 74th Leg., R.S., ch. 704, 1995 Tex. Sess. Law Serv. 3713. That bill, among other things, creates a number of new judicial districts in western Texas. One of those new districts, the 394th, is created by section 20 of House Bill 3235. The 394th is composed of five counties: Culberson and Hudspeth, formerly part of the 34th and 210th Judicial Districts; and Brewster, Presidio, and Jeff Davis, formerly part of the 83rd Judicial District.<sup>1</sup> Section 23 provides for the transfer of cases to the new 394th District Court:

(a) The local administrative district judge shall transfer all cases from Culberson and Hudspeth counties that are pending in the 34th and 210th district courts on the effective date of this Act to the 394th District Court.

(b) The local administrative district judge shall transfer all cases from Brewster, Jeff Davis, and Presidio counties that are pending in the 83rd District Court on the effective date of this Act to the 394th District Court.

....

(d) This section takes effect September 1, 1995.

You indicate that, although "the administrative district judge is required to transfer all cases from Brewster, Presidio and Jeff Davis counties to the 394th District effective

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<sup>1</sup>Section 20 amends subchapter C, chapter 24, Government Code, by adding section 24.539.

September 1, 1995," those counties "are without a district judge" "until the Department of Justice authorizes the preclearance of the court." House Bill 3235 appends standard preclearance language to various of its sections, including section 18, the section that removes Brewster, Jeff Davis and Presidio counties from the 83rd Judicial District:

(e) The secretary of state shall submit the changes made to this section by H.B. 3235 of the 74th Legislature, Regular Session, to the U.S. Justice Department for preclearance under Section 5 of the federal Voting Rights Act of 1965 as amended (42 U.S.C. Section 1973 *et seq.*). The changes made to this section by H.B. 3235 of the 74th Legislature, Regular Session, become inoperative if the U.S. Justice Department files a timely objection pursuant to Section 5 of the Voting Rights Act of 1965 as amended.

Gov't Code § 24.185(e), *added by* Act of May 29, 1995, 74th Leg., R.S., ch. 704, § 18, 1995 Tex. Sess. Law Serv. 3713, 3716-17. You explain that federal preclearance is not likely to occur prior to mid-November and that Governor Bush, quite rightly, will probably not make an appointment to the new court until preclearance has occurred. As a result, the status of cases scheduled for filing in that court is uncertain:

[A] Grand Jury cannot be convened because there is no district court to return the indictments to; defendants desiring a hearing on a Writ of Habeas Corpus have no forum without a district court; pre-trial proceedings are at a standstill without a district court; cases ready for jury trial cannot be set without a district court; defendants presently serving time in boot camp, shock probation or those in a S[ubstance] A[buse] F[elony] P[unishment] F[acility] cannot be returned to the county with jurisdiction because a district court order is required to do so.

You suggest that, pending preclearance, "the immediate and logical solution to the above problems is the appointment of a visiting judge by the administrative district judge." You are concerned, however, about

what effect such an appointment would have on the actions taken by a visiting judge since the court has not been precleared. Conceivably, the impaneling of a Grand Jury by a visiting judge and the return of indictments by that Grand Jury might be attacked on appeal as lacking jurisdiction. A plea of guilty to a visiting judge could be challenged on a Writ of Habeas Corpus on the same basis.

We agree. As the legislature has recognized, application of the federal Voting Rights Act is triggered by "changes" to the makeup of existing judicial districts. Appointment of a visiting judge to the newly created court would be subject to the same federal scrutiny, and would thus not resolve the immediate problem.

In our opinion, however, the language of section 23 itself provides the solution. Subsection (b) of section 23 states that "[t]he local administrative district judge shall transfer all cases from Brewster, Jeff Davis, and Presidio Counties *that are pending in the 83rd District Court on the effective date of this Act* to the 394th District Court." (Emphasis added.) Section 23 does not specify a particular date for *transfer* of pending cases from the 83rd District Court. It merely provides that, when such transfer is effected, it applies to all relevant cases that were *pending* in that court as of September 1, 1995.<sup>2</sup>

In our opinion, the proper date for transfer of those cases may be inferred from the language of House Bill 3235. As noted, the bill indicates that the legislature is familiar with the issue of federal preclearance. Indeed, certain sections, including section 18, "become inoperative," if the Department of Justice merely "files a timely objection" pursuant to the Voting Rights Act. In our view, transfer should not be deemed to have occurred until the secretary of state receives notice of federal preclearance.

We are supported in this conclusion by our secure belief that the legislature could not have intended to bring to a halt the administration of justice in three Texas counties. To find otherwise would leave you, as district attorney for Brewster, Presidio, and Jeff Davis counties,<sup>3</sup> without any effective mechanism for the prosecution of felonies in those counties, beginning on September 1, 1995, and continuing until some future unspecified date that is wholly contingent upon a determination by the federal Department of Justice. We do not believe that the legislature could reasonably have intended such a calamitous result. See *Magnolia Petroleum Co. v. Walker*, 83 S.W.2d 929 (Tex.), *cert. denied*, 296 U.S. 623 (1935); *Oriental Hotel Co. v. Griffiths*, 33 S.W. 652 (Tex. 1895). We hold therefore that section 23 of House Bill 3235 requires the administrative district judge, on the date on which he is advised by the secretary of state that notice of the relevant federal preclearance has been received, or as soon thereafter as is practicable, to transfer all cases from Brewster, Jeff Davis, and Presidio counties that were pending in the 83rd District Court on September 1, 1995, to the 394th District Court. Pending his receipt of such advice, those cases continue to be assigned to the 83rd District Court.

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<sup>2</sup>Section 29 of House Bill 3235 states that the act takes effect on January 1, 1997, "[e]xcept as otherwise provided." Section 23 took effect on September 1, 1995. See May 29, 1995, 74th Leg., R.S., ch. 704, § 23(d), 1995 Tex. Sess. Law Serv. 3713, 3718.

<sup>3</sup>Section 22 of House Bill 3235 provides that the district attorney for the 83rd Judicial District will continue to act as district attorney for Brewster, Jeff Davis, and Presidio counties and will, in addition, serve as district attorney for the newly created 394th Judicial District.

**S U M M A R Y**

Section 23 of House Bill 3235 requires the appropriate administrative district judge, on the date on which he is advised by the secretary of state that notice of the relevant federal preclearance under the Voting Rights Act of 1965 has been received, or as soon thereafter as is practicable, to transfer all cases from Brewster, Jeff Davis, and Presidio counties that were pending in the 83rd District Court on September 1, 1995, to the newly created 394th District Court. Pending his receipt of such advice, those cases continue to be assigned to the 83rd Judicial District Court.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Rick Gilpin".

Rick Gilpin  
Deputy Chief  
Opinion Committee